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IN THE

Supreme Court of the United States

MOHAMMAD MUNAF, ET AL.

Petitioners,

V.

PETE GEREN, ET AL.,

Respondents.

PETE GEREN, ET AL.

Petitioners,

V.

SANDRA K. OMAR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. MEANINGFUL REVIEW OF DETENTION IS FUNDAMENTAL TO THE RULE OF LAW.. 6

A. Habeas Corpus Is Deeply Rooted in the Common Law and Our Constitutional System..... 6

B. Due Process Requires That Every Detainee Be Informed of the Allegations Against Him and Afforded a Meaningful Opportunity to Challenge His Detention..... 9

II. THE GOVERNMENT'S POSITION WOULD UNDERMINE THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY.. 11

A. No Citizen Should Be Detained Based Solely upon Untested Allegations..... 11

B. Participation in a "Multinational Force" Should Not Defeat Jurisdiction over United States Officers..... 12

C. A Subsequent Judgment of an Iraqi Court Should Not Affect the Jurisdiction of a United States Court over a Prior Habeas Petition of a United States Citizen..... 13

CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973) 12

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 8

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 8

Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) 14

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 5, 10-15

Hirota v. MacArthur, 338 U.S. 197 (1948) 13, 14

INS v. St. Cyr, 533 U.S. 289 (2001) 8

Johnson v. Avery, 393 U.S. 483 (1969) 8

Johnson v. Eisentrager, 339 U.S. 763 (1950) 14

Ex parte Milligan, 71 U.S. 2 (1866) 10

Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007) 14

Omar v. Harvey, 479 F.3d 1 (D.C. Cir. 2007) 14

Ex parte Quirin, 317 U.S. 1 (1942) 8, 10

Rasul v. Bush, 542 U.S. 466 (2004) 6, 12

Reid v. Covert, 354 U.S. 1 (1957) 14

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Williams v. Kaiser, 323 U.S. 471 (1945) 6

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I § 9 8

FOREIGN CASES

King v. Overton, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668) 7

King v. Salmon, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669) 7

FOREIGN STATUTES

Petition of Right, 3 Car. 1 c. 1 7

Habeas Corpus Act of 1679, 31 Car. 2 c. 2 7

MISCELLANEOUS

Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ*: (Thorne Ed.) 6

William Duker, *A Constitutional History of Habeas Corpus* (1980) 7

The Federalist No. 84 (Alexander Hamilton) 6

Sir Matthew Hale, *The History of the Common Law of England* (C. Gray Ed. 1971) 7

Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) 6

Charles Le Quesne, *A Constitutional History of Jersey* (1856) 7

INTEREST OF THE AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as amicus curiae, respectfully submits that the issues now before the Court must be resolved in a way that fulfills legitimate national security objectives while preserving the rule of law as embodied in the writ of habeas corpus.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among its goals are "[t]o increase public understanding of and respect for the law, the legal

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

process, and the role of the legal profession" and "[t]o advance the rule of law in the world."[3]

In pursuing its mission and goals, the ABA has established a long-standing commitment to protecting habeas corpus and due process rights. The ABA recognizes the government's responsibility to protect against terrorist activities, but has long concluded that habeas corpus is necessary to prevent arbitrary or unlawful detentions, and that judicial review of detentions is fundamental to this nation's constitutional system and to the rule of law.[4]

The ABA has developed additional competence in this area through its efforts to promote the rule of law, both in this country and elsewhere, through its Rule of Law Initiative. This work has confirmed that the rule of law has no force against a government that can detain a person without judicial review.

The ABA also created a Task Force on the Treatment of Enemy Combatants in March 2002 to examine the framework surrounding the detention of United States citizens declared to be enemy combatants. The Task Force considered the complex questions of statutory, constitutional, and international law and policy raised by such

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[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Feb. 3, 2008).

[4] In its most recent list of prioritized and adopted policy positions, the ABA "urges that individuals detained as 'enemy combatants' be afforded certain procedural rights such as access to counsel and the opportunity for meaningful judicial review of their status, including the right to petition for habeas corpus." ABA Legislative and Governmental Priorities for 2007, *available at* http://www.abanet.org/poladv/priorities (last visited Feb. 3, 2008).

detentions. In its preliminary report, the Task Force concluded:

> United States citizens who are detained by the Government have a right under the Constitution to seek release from their detention through a petition for writ of habeas corpus, a fundamental right which Congress has not suspended. Citizen detainees who have not been charged with violations of United States criminal laws or the law of war should therefore be afforded a prompt opportunity for judicial review of the basis for their continued confinement.[5]

In February 2002, the ABA's House of Delegates adopted a policy urging that proceedings before military tribunals guarantee habeas corpus petition rights, certain due process rights, and the right to independent and impartial judicial review of executive detention, particularly the detention of United States citizens.[6] In February 2003, the ABA's House of Delegates adopted a policy urging that United States citizens detained as "enemy combatants" be afforded the opportunity for meaningful judicial review and access to counsel.[7]

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[5] Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants at 23 (August 8, 2002), *available at* http://www.abanet.org/poladv/priorities/enemy/enemy_combatants.pdf.

[6] Revised Report 8C (February 4, 2002), *available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf (last visited Feb. 3, 2008).

[7] Revised Report 109 (Feb. 10, 2003), *available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Feb. 3, 2008). The report supporting this policy tracked the legal history of the "enemy combatant" designation, as well as United States and international human rights laws

(footnote cont'd)

The ABA's deep concern for protecting habeas corpus rights and for ensuring meaningful judicial review has also been shown in the ABA's recent submission of amicus curiae briefs in this Court[8] and in the United States Court of Appeals for the Second Circuit.[9]

The ABA does not take the position that a citizen may never be detained as an enemy combatant or transferred to the custody of a foreign government. However, as the ABA has stated, "Every person that is detained by our government should have the opportunity for a fair hearing that examines the basis for his/her detention" and further, that "[t]he writ of habeas corpus entrusts the judiciary to ensure that the detention of an individual has legal and factual support."[10]

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and treaties recognizing a detainee's right to judicial review. The report concluded that detainees have a right to judicial review to determine whether there is a factual and legal basis for their detention. *Id. at* 7.

[8] Brief for the American Bar Association as Amicus Curiae in Support of Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696 (Feb. 23, 2004) (asserting that federal courts must be able to conduct meaningful judicial review when United States citizens are detained as "enemy combatants"); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007) (asserting that denial of habeas corpus would conflict with the Constitution and undermine the promotion of the rule of law).

[9] Brief for the American Bar Association as Amicus Curiae in Support of Petitioner-Appellee-Cross Appellant, *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *rev'd*, 542 U.S. 426 (2004) (asserting, *inter alia*, that meaningful judicial review requires petitioner's access to counsel).

[10] Habeas Corpus Rights for Detainees Fact Sheet, *available at* http://www.abanet.org/poladv/priorities/enemy/2007apr_habcorp_factsheet.pdf (last visited Feb. 3, 2008).

SUMMARY OF ARGUMENT

Habeas corpus, the power of the courts to review detention by the Executive, has existed in some form for over seven hundred years, and is no less critical today than it was at the inception of our constitutional system. It remains, in the context of military detentions of this country's citizens, a vital protection of the rule of law. Without habeas corpus, such constitutional protections as due process would be unenforceable and meaningless.

The habeas petitioners here are United States citizens who allege that they have been detained as "enemy combatants" and "security internees" by United States military authorities for over two years without due process. Even though these citizens brought their habeas petitions prior to any action by the Iraqi courts, the government now seeks to turn them both over to Iraqi officials, one to be tried before an Iraqi criminal court, and the other to be executed pursuant to an Iraqi judgment.

Although there may be circumstances in which a citizen may be detained as an enemy combatant or transferred to the custody of a foreign government, due process must be provided to ensure that such detentions and transfers are according to law and not arbitrary. There can be no such inquiry without an opportunity for judicial inquiry into the process actually used.

The government argues that its actions are immune from judicial review because it is operating as part of a "multinational force." The ABA respectfully asserts that this argument is inconsistent with this Court's ruling in *Hamdi v. Rumsfeld* that United States citizens have habeas rights even when they are captured abroad and designated "enemy combatants." *See* 542 U.S. 507, 533 (2004) (plurality opinion). Operation as part of a multinational force should not be permitted to defeat the United States

government's responsibilities to its citizens. Unreviewable military action is not consistent with American legal principles.

ARGUMENT

I. MEANINGFUL REVIEW OF DETENTION IS FUNDAMENTAL TO THE RULE OF LAW.

A. Habeas Corpus Is Deeply Rooted in the Common Law and Our Constitutional System.

Habeas corpus, the principle that one should not be imprisoned by the Executive without fair and impartial judicial review to protect against arbitrary or unlawful government detention, is no less critical today than it was at the inception of our constitutional system. As the Founders recognized, habeas corpus is one of the "essential principles of our Government." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *reprinted in Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 16 (1989). Alexander Hamilton described habeas corpus as "perhaps [a] greater securit[y] to liberty and republicanism than any [the Constitution] contains." *The Federalist No. 84* (Alexander Hamilton).

The modern understanding of habeas corpus throws its roots "deep into the genius of our common law." *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n. 2 (1945)). The writ predates statute, and has existed in some form for over seven hundred years. *See* Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ*: Vol. 4:367 (Thorne Ed.) (containing a form for a writ of habeas corpus ad respondendum).

The importance of the writ has left its mark on English and American history. The refusal of King Charles I to enforce the privilege of the writ was one of the causes

that eventually led to the English Civil War. *See* Petition of Right, 3 Car. 1 c. 1 at ¶ V. During the Protectorate following the English Civil War, prisoners were moved between jails or overseas to prevent service of habeas corpus petitions. *See* William Duker, *A Constitutional History of Habeas Corpus* 48-53 (1980). In 1667, Parliament impeached Edward Hyde, Earl of Clarendon, for such acts. Duker, at 53 (quoting Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, (1663-1667) 6 St. tr. 291).

After the Restoration, when Charles II authorized transfers of English subjects to military garrisons overseas, Parliament responded with the Habeas Corpus Act of 1679, sometimes referred to as the "second Magna Carta" to prevent transfers of prisoners out of the jurisdiction of the habeas courts. *See* 31 Car. 2 c. 2, §§ x and xii.

Particularly as applied to British subjects, there was no question that the power of the writ of habeas corpus extended overseas. In *King v. Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668), and *King v. Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669), the writ of habeas corpus was held to run to the Island of Jersey, which was not part of the Realm of England, but was historically part of the Duchy of Normandy. Sir Matthew Hale, *The History of the Common Law of England*, 121 (C. Gray Ed. 1971); Charles Le Quesne, *A Constitutional History of Jersey*, 98 (1856). Sir Matthew Hale explained *Overton* and *Salmon* on the basis that "the King may demand, and must have an Account of the Cause of any of his Subjects' Loss of Liberty." Hale, *supra*, at 187.

The founders of the United States were deeply aware of the importance of preserving the power of the judiciary to protect individual liberty. Having borne witness first hand to the abuses that can follow when the judiciary is rendered subordinate to executive power (*see* Declaration

of Independence), they saw fit to guarantee the right to habeas corpus in the Suspension Clause of the Constitution. U.S. Const., Art. I § 9. The constitutional protection of habeas corpus predates even the Due Process Clause of the Fifth Amendment.

"There is no higher duty than to maintain [the writ of habeas corpus] unimpaired." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). As this Court has recognized, "[c]ourts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). Clearly, "the writ of habeas corpus is one of the pillars of our constitutional system."[11]

The importance of judicial review extends, perhaps especially, to detentions by military authorities. It would be "extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807). Indeed, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). As the ABA's Task Force on Enemy Combatants concluded, "indefinite detention, denial of counsel, and

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[11] Habeas Corpus Rights for Detainees Fact Sheet, *available at* http://www.abanet.org/poladv/priorities/enemy/2007apr_habcorp_factsheet.pdf (last visited Feb. 3, 2008).

overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy."[12]

B. Due Process Requires That Every Detainee Be Informed of the Allegations Against Him and Afforded a Meaningful Opportunity to Challenge His Detention.

The United States citizens in this case brought their habeas petitions to challenge their detention by United States military forces operating as part of the Multi-National Force – Iraq. They brought their habeas petitions before the Iraqi courts were involved in any way, and their habeas petitions do not raise any challenges against Iraqi court procedures. Rather, these United States citizens are being held solely as a result of a determination by a panel of three American military officers that they are "enemy combatants" and "security internees."

It is unclear what protections, if any, the prisoners received or what standards the panels applied in approving the prisoners' detentions. But it is undisputed that the habeas petitioners were not represented by counsel. They allege in their habeas petitions that they were not afforded due process, and those allegations have yet to be tested in court.

Due process must be provided to ensure that every "citizen-detainee seeking to challenge his classification as an enemy combatant . . . receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral deci-

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[12] Revised Report 109 (Feb. 10, 2003), *available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Feb. 3, 2008).

sionmaker." *Hamdi*, 542 U.S. at 533. Without judicial review to ensure that such process is actually provided, the vitality of constitutional rights lies entirely within the discretion of a single branch of government. That result is fundamentally contrary to the rule of law.

The ABA does not take the position that a citizen may never be detained as an enemy combatant or transferred to the custody of a foreign government; however, the ABA continues respectfully to assert that due process must be provided to ensure that such detentions and transfers are according to law and not arbitrary. *See* ABA Amicus Brief, *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. Feb. 23, 2004). There can be no such inquiry without an opportunity for judicial inquiry into the process actually used.

To be sure, the Executive is entitled to some deference with respect to actions taken pursuant to its constitutional responsibilities in the conduct of foreign affairs and as commander-in-chief of the Armed Forces. But such deference has never extended so far as to authorize Executive detentions of United States citizens without any judicial review. "While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated role of reviewing and resolving claims like those presented here." *Hamdi*, 542 U.S. at 535. The judiciary must be empowered to honor its responsibilities "in time of war, as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Quirin*, 317 U.S. at 19. The Constitution is this country's greatest strength, not its weakness. *See Ex parte Milligan*, 71 U.S. 2, 120-21 (1866).

II. THE GOVERNMENT'S POSITION WOULD UNDERMINE THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY.

A. No Citizen Should Be Detained Based Solely upon Untested Allegations.

At this preliminary stage, the issue before this Court is not whether the habeas petitioners may be turned over to Iraqi authorities. Rather, the issue before this Court is whether the petitioners' habeas claims may be heard, and whether the district court can protect its jurisdiction by enjoining such a transfer while a habeas petition is pending.

Both petitioners raised serious claims in their habeas petitions, each of which was filed before the Iraqi courts had any involvement. Both petitioners claim that they are United States citizens and that they have been seized and detained as alleged "enemy combatants" and "security internees" for more than two years by United States military forces without due process. They claim to be innocent of the underlying allegations of enemy belligerency or criminal activity. One claims that he will face torture if turned over to the Iraqi government. The other was condemned to death after his habeas petition was filed. Neither the habeas petitioners nor the habeas respondents have had the opportunity to test their assertions in court.

The ABA takes no position with respect to the merits of the habeas petitioners' claims, but asserts that no citizen should be detained based solely upon untested allegations. "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Hamdi*, 542 U.S. at 537.

B. Participation in a "Multinational Force" Should Not Defeat Jurisdiction over United States Officers.

The government has taken the position that the federal courts have no jurisdiction to review detentions by United States military officers acting as part of the Multinational Force – Iraq, and that, even if the courts have such jurisdiction, the government can defeat it unilaterally by transferring these detainees to the custody of a foreign government. The consequences of either of the government's positions would eviscerate the rule of law, which requires that judicial review must be available to prevent arbitrary or unlawful detention.

The writ of habeas corpus does not act upon the detainee, but upon the custodian. This court has recognized that a writ of habeas corpus may properly issue if the custodian is within the jurisdiction of the court. *See Rasul v. Bush*, 542 U.S. at 481; *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973). United States military members in the multinational force remain under the "unified command" (*see* Brief for the Federal Parties at 2) of United States government officials within the jurisdiction of the district court. If the government's position were adopted, and its participation as a part of a multinational force were deemed to immunize its actions from any judicial review, even when applied to United States citizens, such an argument would apply whether or not the detainee had been criminally charged, and whether or not the detainee had received any meaningful opportunity to challenge his detention. Such a result would directly contravene *Hamdi*, which held that a United States citizen detained by United States military authorities has the right to due process. *See Hamdi*, 542 U.S. at 533.

The "multinational force" argument, further, could arguably apply whenever the United States cooperates with allies which, during the past century, has occurred in

nearly every prolonged military conflict in which it has been involved. But cooperation with allies should not be permitted to defeat the United States government's responsibilities to its citizens. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

In asserting that participation in a multinational force should not impair the jurisdiction of the federal courts over United States officials, the ABA in no way means to disparage the contributions of this country's allies in the United Nations or the efforts of the Iraqi people in restoring security and stability in Iraq. But the ABA knows, and has seen in its work in promoting the rule of law overseas, that a strong and independent court system in the United States with the power to hold even the military accountable to the Constitution can only promote this country's reputation abroad as a defender of liberty and the rule of law. Unreviewable military action is not consistent with American legal principles.

C. A Subsequent Judgment of an Iraqi Court Should Not Affect the Jurisdiction of a United States Court over a Prior Habeas Petition of a United States Citizen.

As noted earlier, the habeas petitions in these cases were filed before, not after, any action by the Iraqi government or its courts. Although jurisdiction was not invoked to review the judgment of the Iraqi courts, the D.C. Circuit panel in *Munaf* held that, in light of this Court's *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948), there is no jurisdiction because the prisoner was subsequently convicted by an Iraqi court. However, the panel also noted:

> In holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens. In particular, *Hirota* does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute.

Munaf v. Geren, 482 F.3d 582, 584 (D.C. Cir. 2007). The panel majority, relying on its reading of *Hirota*, left to this Court "the prerogative of overruling its own decisions." *Id.* at 585 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Further, the D.C. Circuit's reading of the case was heavily influenced by its own prior opinion in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949). *See Omar v. Harvey*, 479 F.3d 1, 7 (D.C. Cir. 2007).

The government's assertion that there can be no habeas jurisdiction when the United States military is operating as part of a multinational force is not supported by the narrow language employed in *Hirota*, in which this Court held only that it lacked the power to review judgments against the petitioners under the circumstances of that case. *Hirota*, 338 U.S. at 198. Nothing in *Hirota* suggests that the Executive is free to detain a United States citizen and is not amenable to judicial review simply because it acts in concert with foreign governments.

The United States has a special obligation under constitutional law for the protection of its citizens. *See Reid v. Covert*, 354 U.S. 1, 5 (1957). It is for this reason that the Court has recognized that citizenship of the detainee can be a head of habeas corpus jurisdiction, even where the detention takes place within the territorial jurisdiction of a foreign country. *See id.*; *see also Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("The years have not destroyed or diminished the importance of citizenship nor

have they sapped the vitality of a citizen's claims upon his government for protection"). A rule exempting detentions of citizens overseas from judicial review would create precisely the perverse incentive described by Justice O'Connor in *Hamdi*:

> Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. ... It is not at all clear why [presence outside the United States] should make a determinative constitutional difference.

Hamdi, 542 U.S. at 524.

The government expresses concern that habeas corpus jurisdiction would conflict with the Iraqi government's "exclusive jurisdiction" to punish offenses that occur within its sovereign borders. As the ABA pointed out in its amicus brief filed in *Boumediene*, a distinction based on whether detentions by the United States military occurred within or outside of the United States would create a situation "where individual rights are not judicially enforceable, thus undermining the most fundamental attribute of the rule of law." Brief Amicus Curiae of the ABA, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007) at 10. The ABA therefore respectfully asserts that the district court must have jurisdiction to review detentions of United States citizens by its military, regardless of the location of the detention.

CONCLUSION

The American Bar Association respectfully requests that the judgment of the Court of Appeals in *Munaf v. Geren* be reversed, and the judgment of the Court of Appeals in *Omar v. Harvey* be affirmed.

Respectfully submitted,

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